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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 90

(Docket No. 917)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,
vs.
EUGENE BOLLE,
Respondent.

MISSTATEMENTS IN RESPONDENT'S BRIEF.

RAY N. VAN DOREN,
SAMUEL H. CADY,
NELSON J. WILCOX,
Counsel for Petitioner.

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 60, October Term, A. D. 1931.

Chicago and North Western Railway Company,
Petitioner,

vs.

Eugene Bolle,
Respondent.

MISSTATEMENTS IN RESPONDENT'S BRIEF.

We know that there is no rule authorizing petitioner to file this document, but we are handing it to the Clerk with the thought that if it will be of assistance to the Court our time and expense in preparing and printing it will have been well spent. Its only purpose is to prevent misunderstandings due to misstatements in Respondent's Brief, among others the following:

Page 6, middle. He says that our statement on page 5 of our brief that "all of the movements approaching and at the chutes were made on the beck and instructions of the 'end-chute man,'" is based on the testimony of petitioner's witness Fleming, given on a former trial but not repeated on the present trial. This is not so. Our statement was and is based on the testimony of respondent's own witness [illegible] (R. [illegible]), as follows:

> "We found out regularly and ordinarily from the end-chute man at which one of the two chutes we were to take our coal. We found that out on the night of

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> the accident. * * * With reference to all of the
> [illegible] after our engines got through the crossover
> [illegible] of the [illegible], the coal-chute man directed
> movements. He gives his directions to the engi
> This coal-chute man was there on the job this
> in question and before this accident happened, gi
> these directions. He gives his directions verbally
> know he was giving them that night because I h
> them. I was on the northbound main track, 10
> feet away from the engine, on the side away from
> coal-chute, the engines being between me and the
> chute man. I could hear him giving directions to
> ating the engines, as to which slide to use, and whe
> to back up or move forward and so on. * * * After
> coal-chute man put up his slide I heard him tell
> operator of the engine Kucera was on, the second
> gine from the south, to back up."

Page 7, middle. He says that the statement made by
on page 8 of our brief, to the effect that neither the c
chute man nor the operator of the engines at the tim
question could see Bolle from their positions, and that
is clear and uncontradicted, is not supported by any
dence except that of the coal-chute man and the oper
of the engine, and that the physical facts are to the c
trary. This is not so (R. 47-8, 68, 70-1, 80). As to dem
stration by the physical facts, the exact contrary of w
counsel says is true. The heater engine, to the back
of the cab of which Bolle was clinging, was headed
The engine on which were the coal-chute man and its o
ator was south of the heater-engine and was headed
they faced each other, so to speak. Between Bolle and t
other two men were the cab of the heater-engine, the w
length of the boiler and the pilot of the heater
[illegible] the protuberances on the top of the boiler, such
the sand-dome, the bell and the headlight, the two pilot
entire length of the boiler of the more southerly of
[illegible] the protuberances on the top of the boile

the front, nearly the end of that engine. There were two men were in the cab of the other engine, there being no [illegible] of the [illegible] [illegible] are very limited and the windows would reflect the lights so that looking through them would be much the same as looking out through the window of any lighted room into the night. Perhaps most persuasive of all, however, are the facts that it was nighttime and dark, Bollo was a long distance away from these other men, and he had no lantern. Furthermore, there was no occasion for those men to keep a lookout for persons clinging to any of the various parts of the engine ahead of them.

Page 8, top, pages 17, 18, and elsewhere in his brief, he refers to testimony of petitioner's witnesses given at other trials of the case. It is difficult for us to comprehend whether counsel offers these references as affirmative evidence. However, it is our understanding that they are not.

Page 15, bottom—page 16, top. He says that the maintenance of way car was used for the purpose of maintaining the tracks, signalling devices, etc. If this is a deliberate misstatement its purpose is obvious in connection with counsel's reliance on the case of *Philadelphia etc. v. Smith*, 250 U. S. 101 as controlling here. See pages 18, 19, 20, and 21 of his brief. The maintenance of way car was not a car in any sense except that it once had been part (the upperworks) of a box car. It was a stationary building. It was not used for the purpose of maintaining the tracks, signalling devices, etc. The reference to the record given by counsel (page 16), which describes a part of the testimony of petitioner's brother, the night foreman of the roundhouse. An examination of what he says on that page shows that he said only [illegible] [illegible] [illegible] the maintenance of way car was located at one [illegible] that he thought it was where [illegible] kept supplies for bridges and [illegible] and things like that used around the tracks in the maintenance

of way car, in the maintaining of the tracks, etc, and s
nalling devices." From which it is seen that (1) there
no testimony in the record that the maintenance of w
car was heated at all, and (2) at most it was a storeho
for materials.

Page 16, top. He says that in the regular course of hi
employment plaintiff turned turntables for engines us
in both classes of commerce, and fired and watered th
engines. It is true that on his direct examination plai
tiff's testimony gives the impression that his chief duti
in the roundhouse were connected with matters not invol
ing the heating plant. The court below seems to hav
read that part of the record, for it says that:

> (R. 168) "His duties consisted of watching engines
> in the roundhouse, sanding them [although there isn'
> a word of testimony in the record that he ever sande
> an engine], turning turntables, and other duties i
> the roundhouse with reference to engines in both i
> terstate and intrastate commerce. He also fired th
> stationary boiler, or the locomotive engine which wa
> substituted when the boiler was out of service. * *
> (R. 170): It will be observed that appellee's genera
> duties consisted of 'watching engines in the round
> house with reference to engines engaged in both inte
> state and intrastate commerce. He also fired the st
> tionary boiler or the locomotive engine which was su
> stituted when the boiler was out of service,' " etc.

But it should be remembered that "his duties" and hi
"general duties" as referred to by the court below, and o
which its decision was grounded, faded to the vanishi
point on plaintiff's cross-examination, as pointed out i
our brief, page 60, under the heading "K. Responden
Contentions," when he said that it was only when Tony w
away at Busch that he "did those things, build fires, tu
turntables and watched engines," and "I was hired to fi
the stationary boiler."

Page 17, near top. He attributes to us a suggestion we have not made, namely, that in the *Pedersen*, [illegible], *Szary*, and *Collins* cases this Court used, instead of the second part of the Shanks case test, the following language:

"* * * so closely related to interstate commerce as to be practically a part of it."

A reference to pages 90-1 of our brief shows that nothing of the kind is there said. On the contrary, there and here, then, now and always, we state that this Court, from the Shanks decision on, or since January, 1916, has strictly adhered to the Shanks case test, namely:

"The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

Page 27, bottom. He says that it was stipulated by the defendant on the trial that the three engines to which plaintiff's engine was coupled made the trip to the coal chute to be coaled for later engagement in both classes of commerce. This is true, but might be misleading, because it says nothing about that stipulation having been subject to defendant's objections, which were overruled. The stipulation was made, subject to the objections, for use by plaintiff at the trial in the event that the trial court should overrule the objections, and to expedite the trial and make it unnecessary, in that event, for plaintiff to procure the attendance of witnesses who could testify to the facts set out in the stipulation.

Page 37, near top. He says that the witness [illegible] did not testify that the period during which he knew of [illegible] presence on top of the engine, and during which he might have done something but did nothing, was he

tween the time of his discovery of Belle and the time wh
the coal-chute man gave the order to move the engines.

As pointed out in our brief, pages 45-6, McManama
testified that he heard the coal-chute man give the ord
to move the engines, and that "at once after the order wa
given" the engines were moved north, and that "that i
what the order meant; he followed that order as soon a
it was given." That testimony is not ambiguous and i
the natural course of things the movement *would* immediately follow the order. It is true that the record also shows that McManaman said that he had time after he discovered the man on the engine, "and after his order was given," to do something, etc. However, it is apparent that he did not mean that the interval of time in question was between the giving of the order to move and the actual movement, because he denied that flatly, as above shown, and he also testified that during the interval, whenever it was, he did nothing because he didn't think they would move the engines while the man he thought was the coal-chute man was taking coal into the heater engine. He would not have said that if the interval he was talking about occurred after the coal-chute man had ordered the movement, which, as he says, meant that the movement should be made at once.

Page 39, bottom. He says that if Terasky's statement, that he didn't order Belle to take water, is true, then our argument that in taking water plaintiff did not act on his original instructions must fail. In this connection it is to be noted that we have said nothing about Terasky's denial of plaintiff's statement that he (Terasky) ordered him to take water, but have assumed, as here in this connection we must, that plaintiff's statement of the fact, and not Terasky's, is true.

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And the sentence beginning at the bottom of page [illegible] is not warranted and is not fair to us. In our brief in this case we have assumed the truth of the testimony of plaintiff with respect to every fact except that he placed himself in the position he was in at the time of the accident for the purpose of taking water. The truth of that cannot be assumed, because it is contrary to the physical facts, and on his cross-examination he stated that water could not be taken at that place, and that he knew that it could not, but still insisted, and his counsel in his brief now insists, that he got up on the rim of the coal-bin, just back of the cab, and rode there, clinging to the roof of the cab, for the purpose of finishing the task of taking water into his engine when it should again arrive at the water stand-pipe.

Respectfully offered,

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